

## INTRODUCTION

On June 26, 2007, Petitioner Dale Wills, a state prisoner  
incarcerated at the California State Prison - Corcoran, filed a  
petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254  
alleging ineffective assistance by his trial and appellate counsel  
and prosecutorial misconduct. The Court ordered Respondent to show  
cause why the writ should not be granted. On October 16, 2007,  
Respondent James Tilton filed a motion to dismiss. Petitioner  
filed an opposition on January 18, 2008. Respondent filed a reply  
on January 31, 2008. For the reasons set forth below, Respondent's  
motion to dismiss is GRANTED.

## BACKGROUND

23        In 1988, Petitioner pled guilty to a first degree burglary  
24 charge stemming from an incident that occurred at the home where he  
25 was living with his family. He was sentenced to one year in  
26 prison.

In May, 1995 Petitioner was arrested in San Lorenzo for being drunk in public. (Mot. to Dismiss at 2.) Police discovered a bike

1 in Petitioner's possession that was reported as stolen from a  
2 residence about a half mile from where Petitioner was arrested.  
3 (Id.) Petitioner was subsequently charged with first degree  
4 burglary and grand theft. (Id.)

5 In May, 1996, Petitioner was found guilty of both the theft  
6 and burglary. The court found true the allegation that Petitioner  
7 had a prior 1988 conviction for first degree burglary, which  
8 constituted a "strike" under California's Three Strikes law. See  
9 Cal. Penal Code §§ 667(e)(1), 1170.12(c)(1). The court also found  
10 true two allegations that Petitioner had served prior prison terms.  
11 See id. § 667.5(b). Petitioner was sentenced to seventeen years in  
12 prison based upon his two prior prison commitments and his 1988  
13 burglary conviction.

14 Petitioner challenged his conviction in the California Court  
15 of Appeal where it was affirmed on June 30, 1997. Thereafter,  
16 Petitioner filed two unrelated state habeas corpus petitions in the  
17 California Supreme Court alleging various violations of his rights  
18 by prison officials.<sup>1</sup>

19 In March, 2005, Petitioner discovered a case, People v. Davis,  
20 which he contends should have been cited by his trial counsel  
21 because it stands for the proposition that one cannot burglarize  
22 one's own home.<sup>2</sup> 18 Cal. 4th 712, 721 (1998) (citing People v.

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24       <sup>1</sup> The first of these claims involved an allegedly "arbitrary  
25 withholding of Petitioner's tennis shoes by prison officials." The  
26 second involved alleged confiscation of his property as well as denial  
of access to the courts. Both claims were rejected by the California  
Supreme Court with a citation to In re Dexter, 25 Cal. 3d 921 (1979).

27       <sup>2</sup> Davis was decided in 1998, two years after Petitioner was  
28 sentenced by the trial court.

1 Gauze, 15 Cal. 3d 709, 714 (1975)). Thus, he claims, Davis  
2 invalidates his 1988 burglary conviction because the facts alleged  
3 in that conviction involved the burglary of the home where he lived  
4 at that time.

5 Petitioner subsequently filed a petition for a writ of habeas  
6 corpus in the Alameda County Superior Court, which was denied on  
7 March 21, 2006. He filed a subsequent habeas petition in the  
8 California Court of Appeal which was denied on June 1, 2006.  
9 Petitioner filed a third habeas petition in the California Supreme  
10 Court which was denied on February 7, 2007.

11 Petitioner filed the present petition for a writ of habeas  
12 corpus on June 26, 2007. The claims raised in the petition  
13 include: (1) ineffective assistance of counsel for failing to move  
14 to strike his 1988 burglary conviction because it was invalid under  
15 Davis; and (2) prosecutorial misconduct in charging his previous  
16 burglary conviction as a prior, for the same reason.

#### DISCUSSION

19 The AEDPA became law on April 24, 1996 and imposed for the  
20 first time a statute of limitations on petitions for a writ of  
21 habeas corpus filed by state prisoners. Petitions filed by  
22 prisoners challenging non-capital state convictions or sentences  
23 must be filed within one year of the latest date on which: (A) the  
24 judgment became final after the conclusion of direct review or the  
25 time passed for seeking direct review; (B) an impediment to filing  
26 an application created by unconstitutional state action was  
27 removed, if such action prevented petitioner from filing; (C) the

1 constitutional right asserted was recognized by the Supreme Court,  
2 if the right was newly recognized by the Supreme Court and made  
3 retroactive to cases on collateral review; or (D) the factual  
4 predicate of the claim could have been discovered through the  
5 exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). Also,  
6 "[t]he time during which a properly filed application for state  
7 post-conviction or other collateral review with respect to the  
8 pertinent judgment or claim is pending shall not be counted toward  
9 any period of limitation." Id. § 2244(d)(2).

10 A state prisoner with a conviction finalized after April 24,  
11 1996, such as Petitioner, ordinarily must file his federal habeas  
12 petition within one year of the date his process of direct review  
13 came to an end. See Calderon v. United States Dist. Court  
14 (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), overruled in part on  
15 other grounds by Calderon v. United States Dist. Court (Kelly), 163  
16 F.3d 530 (9th Cir. 1998) (en banc).

17 The one-year period generally will run from "the date on which  
18 the judgment became final by conclusion of direct review or the  
19 expiration of the time for seeking such review." 28 U.S.C.  
20 § 2244(d)(1)(A). In a case where a petitioner does not seek review  
21 in the state supreme court, "direct review" concludes forty days  
22 after the court of appeals renders its decision. Smith v. Duncan,  
23 297 F.3d 809 (9th Cir. 2002).

24 In the present case, Petitioner did not seek review in the  
25 California Supreme Court. Thus, the judgment became final for  
26 purposes of the statute of limitations on August 9, 1997, forty  
27 days after the court of appeal rendered its decision. Duncan, 297

1 F.3d at 809. Accordingly, Petitioner was required to file a  
2 federal habeas corpus petition no later than August 9, 1998.  
3 Because he did not file the present petition until June 26, 2007 --  
4 nearly nine years after the limitations period had expired -- the  
5 petition is untimely unless he can show that he is entitled to  
6 tolling or to a delayed commencement of the limitations period.

7 I. Statutory Tolling

8 The petition may nonetheless be timely if the limitations  
9 period was tolled under 28 U.S.C. § 2244(d)(2) for a substantial  
10 period of time. As noted earlier, AEDPA's one-year limitations  
11 period is tolled under § 2244(d)(2) for "[t]he time during which a  
12 properly filed application for state post-conviction or other  
13 collateral review with respect to the pertinent judgment or claim  
14 is pending. . . ." 28 U.S.C. § 2244(d)(2). The limitations  
15 period is also tolled during the time between a lower state court's  
16 decision and the filing of a notice of appeal to a higher state  
17 court. Carey, 536 U.S. at 223. In California, where prisoners  
18 generally use the state's original writ system, this means that the  
19 limitations period remains tolled during the intervals between a  
20 state court's disposition of an original state habeas petition and  
21 the filing of the next original state habeas petition in a higher  
22 court, provided the prisoner did not delay unreasonably in seeking  
23 review in the higher court. See id. at 220-25.

24 Petitioner filed his state habeas petition in the Alameda  
25 County Superior Court on February 18, 2005. However, he is not  
26 entitled to tolling under Section 2244(d)(2) because the  
27 limitations period had already run on August 9, 1998. A state  
28

1 habeas petition filed after AEDPA's statute of limitations ended  
2 cannot toll the limitations period. "[S]ection 2244(d) does not  
3 permit the reinitiation of the limitations period that has ended  
4 before the state petition was filed," even if the state petition  
5 was timely filed. See Ferguson v. Palmateer, 321 F.3d 820, 823  
6 (9th Cir. 2003) (holding that Oregon's two-year limitations period  
7 for the filing of state habeas petitions does not alter the  
8 operation of the AEDPA, even though prisoners who take full  
9 advantage of the two-year period will forfeit their right to  
10 federal habeas review). Section 2244(d)(2) cannot revive the  
11 limitations period once it has run. It cannot restart the clock to  
12 zero; it can only serve to pause a clock that has not yet fully  
13 run. Thus, in order to toll the limitations period under  
14 § 2244(d)(2), Petitioner should have begun to pursue collateral  
15 relief in state court before AEDPA's one-year limitations period  
16 had expired. See Ferguson, 321 F.3d at 823; see also Rashid v.  
17 Kuhlmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998) ("Once the  
18 limitations period is expired, collateral petitions can no longer  
19 serve to avoid a statute of limitations").

20 Accordingly, Petitioner's state habeas petition filed on  
21 February 18, 2005 does not revive the limitations period because it  
22 had already expired. Therefore, without more, Petitioner is not  
23 entitled to statutory tolling of the limitations period.

24 II. Delayed Commencement

25 Petitioner argues for a delayed commencement of the  
26 limitations period pursuant to 28 U.S.C. § 2244(d)(1)(B) and (C).  
27

28 Under 28 U.S.C. § 2244(d)(1)(B), the statute of limitations in

1 habeas proceedings does not begin to run until "the date on which  
2 the impediment to filing an application created by state action in  
3 violation of the Constitution or laws of the United States is  
4 removed, if the applicant was prevented from filing by such state  
5 action."

6 Petitioner contends that the State's failure to provide him  
7 with effective assistance of counsel amounted to a state-created  
8 impediment to his filing of his state and federal habeas petitions.  
9 Petitioner is effectively arguing that because he relied upon the  
10 Constitutional guarantee of effective assistance of counsel at  
11 trial, he was "impeded" from looking into the case law surrounding  
12 his 1988 burglary conviction (and subsequently discovering Davis).  
13 Petitioner cites Coleman v. Thompson for the proposition that  
14 ineffective assistance of state-appointed counsel "constitutes an  
15 'impediment to filing an application created by State action in  
16 violation of the Constitution.'" 501 U.S. 722, 754 (1991).

17 Coleman is distinguishable from the present case and does not  
18 apply because it addresses the issue of procedural default. In  
19 Coleman, the petitioner was unable to pursue federal habeas relief  
20 because of the failure of his counsel, post-trial, to file a direct  
21 appeal before the deadline. Id. Here, Petitioner's counsel  
22 allegedly failed to raise a specific motion before or during trial.  
23 Counsel's alleged mistake had no effect upon Petitioner's ability  
24 to file for collateral relief, despite the fact that Petitioner had  
25 no understanding of the relevant case law or the mistake his trial  
26 counsel allegedly made. Rather than being defaulted because of his  
27 counsel's failure to appeal, Petitioner's claim is time-barred.  
28

1       Accordingly, Petitioner's claim that a state-created  
2 impediment delayed the onset of the statute of limitations fails  
3 because Petitioner, rather than trial counsel, was responsible for  
4 timely filing his habeas petition.

5       Petitioner also contends that he is entitled to delayed  
6 commencement based upon a new rule of constitutional law handed  
7 down by the Supreme Court in Rompilla v. Beard, 545 U.S. 374  
8 (2005).

9       Under 28 U.S.C. § 2244(d)(1)(C), the statute of limitations in  
10 habeas proceedings does not begin to run until "the date on which  
11 the constitutional right asserted was initially recognized by the  
12 Supreme Court, if the right has been newly recognized by the  
13 Supreme Court and made retroactively applicable to cases on  
14 collateral review."

15      Petitioner claims that June 30, 2005, the date of the Supreme  
16 Court's ruling in Rompilla, is the proper starting date for the  
17 statute of limitations. He states:

18      In Rompilla, the Supreme Court, for the very  
19 first time, held that an attorney's failure to  
20 conduct an adequate investigation of prior  
convictions amounted to deficient performance,  
21 see 545 U.S. at 383, that was sufficiently  
prejudicial to sustain a finding of ineffective  
assistance of counsel. See id. at 390. Thus,  
22 the Rompilla Court announced a "new rule." And  
because Rompilla is a habeas proceeding, it  
necessarily follows then, *a fortiori*, that it  
23 has been "made retroactively applicable to  
cases on collateral review" as the holding is  
dependent on retroactivity, i.e., Rompilla  
could not have obtained the relief he did  
24 unless the decision called for retroactive  
application.

25  
26 (Opp'n at 18-19.)

27      The Supreme Court's decision in Rompilla did not pronounce a  
28

1 new rule of constitutional law as the term is used in section  
2 2244(d)(1)(C). Instead, the case cites Strickland v. Washington,  
3 466 U.S. 668 (1984), which announced the current rule under federal  
4 law for reviewing ineffective assistance of counsel claims. See In  
5 re Hutcherson, 438 F.3d 749 (11th Cir. 2006) (denying petitioner's  
6 request to file a second habeas corpus petition under 28 U.S.C.  
7 § 2244(b) because "the Court's decision in Rompilla was another  
8 interpretation of the Court's long-standing principles set forth in  
9 Strickland v. Washington" (internal citations omitted)).

10 Thus, because the Strickland line of cases was available to  
11 Petitioner during the relevant statute of limitations period, his  
12 argument based on section 2244(d)(1)(C) fails. Accordingly, his  
13 federal habeas is untimely, unless equitable tolling applies.

14 III. Equitable Tolling

15 The one-year limitations period can be equitably tolled  
16 because section 2244(d) is a statute of limitations and not a  
17 jurisdictional bar. See Beeler, 128 F.3d at 1288. "When external  
18 forces, rather than a petitioner's lack of diligence, account for  
19 the failure to file a timely claim, equitable tolling of the  
20 statute of limitations may be appropriate." Miles v. Prunty, 187  
21 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling will not be  
22 available in most cases because extensions of time should be  
23 granted only if "'extraordinary circumstances' beyond [a]  
24 prisoner's control make it impossible to file a petition on time."  
25 Beeler, 128 F.3d at 1288 (citation and internal quotation marks  
26 omitted). The prisoner must show that "the 'extraordinary  
27 circumstances' were the cause of his untimeliness." Spitsyn v.  
28 Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted). The

1 Ninth Circuit has said that the petitioner "bears the burden of  
2 showing that this extraordinary exclusion should apply to him."  
3 Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). "'[T]he  
4 threshold necessary to trigger equitable tolling [under AEDPA] is  
5 very high, lest the exceptions swallow the rule.'" Id. at 1066  
6 (quoting United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir.),  
7 cert. denied, 531 U.S. 878 (2000)). The grounds for granting  
8 equitable tolling are "highly fact dependant." Lott v. Mueller,  
9 304 F.3d 918, 923 (9th Cir. 2002). Where a prisoner fails to show  
10 "any causal connection" between the grounds upon which he asserts a  
11 right to equitable tolling and his inability to file a federal  
12 habeas application timely, the equitable tolling claim will be  
13 denied. Gaston v. Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005),  
14 amended, 447 F.3d 1165 (9th Cir. 2006).

15 However, "[r]ather than let procedural uncertainties  
16 unreasonably snuff out a constitutional claim, the issue of when  
17 grave difficulty merges literally into 'impossibility' should be  
18 resolved in [a petitioner's] favor." Lott, 304 F.3d at 920. When  
19 a prisoner is proceeding pro se, his allegations regarding  
20 diligence in filing a federal petition on time must be construed  
21 liberally. Roy v. Lampert, 465 F.3d 964, 970 (9th Cir. 2006).

22 Petitioner argues that he is entitled to equitable tolling  
23 under "the doctrine of fraudulent concealment." (Mem. in Supp. of  
24 Pet. for Writ of Habeas Corpus at 21.) Petitioner summarizes his  
25 claim as follows:

26 Due to his lack of adequate knowledge of the  
27 law and sole reliance on appointed counsel  
representing him in the trial and appellate  
28 courts, Petitioner had no objectively  
reasonable cause to believe or even remotely

1 suspect that any grounds existed to justify the  
2 relief sought by this current petition until  
3 March of 2005, when Petitioner came upon the  
People v. Davis case.

4 (Pet. at 12-13.) According to Petitioner, it was not until he  
5 discovered Davis that he could have known that his counsel had  
6 failed to inform him of it. Based upon his total reliance on  
7 counsel, he alleges that counsel's failure to inform him of Davis  
8 amounts to "fraudulent concealment" entitling him to equitable  
9 tolling.

10 There is no "doctrine of fraudulent concealment" in the  
11 equitable tolling context. Petitioner has not alleged any  
12 affirmative conduct on the part of his trial or appellate counsel  
13 that amounts to concealment. Instead, Petitioner is effectively  
14 alleging that he is entitled to equitable tolling because he was  
15 ignorant of the law and his former counsel failed to notify him of  
16 a new case.

17 Petitioner's argument fails. The law is clear that ignorance  
18 of the law and lack of legal experience typically do not excuse  
19 untimely filing, even for a pro se incarcerated prisoner. Rasberry  
20 v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006).

21 Petitioner also claims that he is entitled to equitable  
22 tolling because he was held in the prison's Secure Housing Unit  
23 (SHU) and had restricted law library access. Petitioner does not  
24 describe in any detail how his law library access was "more  
25 restricted" than any other inmate. Further, he alleges no specific  
26 set of facts setting forth how long he was housed in the SHU and  
27 how his inability to access the law library during that time  
28 prevented him from filing his federal habeas petition in a timely

1 manner. Therefore, Petitioner's argument fails.

2 Accordingly, Petitioner is not entitled to equitable tolling  
3 of the limitations period.

4 IV. Actual Innocence

5 The actual innocence gateway established in Schlup v. Delo,  
6 513 U.S. 298 (1995), may be available to a petitioner whose  
7 petition is otherwise barred by the AEDPA's limitations period.  
8 See Majoy v. Roe, 296 F.3d 770, 776-77 (9th Cir. 2002) (implying  
9 that unavailability of actual innocence gateway would raise serious  
10 constitutional concerns and remanding to district court for a  
11 determination of whether actual innocence claim was established  
12 before deciding whether gateway is available under AEDPA). For  
13 purposes of this Order, this Court will assume that actual  
14 innocence, if established according to the Schlup standard, would  
15 avoid the statute of limitations bar.

16 Thus,

17 [i]f a petitioner . . . presents evidence of innocence so  
18 strong that a court cannot have confidence in the outcome of  
19 the trial unless the court is also satisfied that the trial  
was free of non-harmless constitutional error, the petitioner  
should be allowed to pass through the gateway and argue the  
merits of his underlying claim.

20 Id. at 316.

21 "To be credible, such an actual innocence claim requires  
22 petitioner to support his allegations of constitutional error with  
23 new reliable evidence -- whether it be exculpatory scientific  
24 evidence, trustworthy eyewitness accounts, or critical physical  
25 evidence -- that was not presented at trial." Schlup, 513 U.S. at  
26 324. The "new" evidence need not be newly available, just newly  
27 presented -- that is, evidence that was not presented at trial.  
28

1     Griffin v. Johnson, 350 F.3d 956, 961 (9th Cir. 2003).

2                 It is not enough that the new evidence show the existence of  
3 reasonable doubt; rather, petitioner must show "that it is more  
4 likely than not that no 'reasonable juror' would have convicted  
5 him." Schlup, 513 U.S. at 329. As the Ninth Circuit has stated,  
6 "the test is whether, with the new evidence, it is more likely than  
7 not that no reasonable juror would have found [p]etitioner guilty."  
8 Van Buskirk v. Baldwin, 265 F.3d 1080, 1084 (9th Cir. 2001). Thus,  
9 actual innocence means factual innocence, not merely legal  
10 insufficiency. Bousley v. United States, 523 U.S. 614, 623-24  
11 (1998) (citing Sawyer, 505 U.S. at 339).

12                 In the present case, Petitioner alleges that he is actually  
13 innocent of the crimes of which he was convicted in 1996 as well as  
14 the 1988 burglary charge to which he pled guilty. Petitioner  
15 suggests that due to misconduct on the part of both the defense and  
16 the prosecution, his 1996 trial was corrupted and he was falsely  
17 convicted. (Opp'n at 20-25.)

18                 Petitioner alleges that his defense counsel was ineffective in  
19 failing to move to suppress the prosecution's evidence (a bicycle  
20 that he possessed, the fact that he was intoxicated, and  
21 incriminating statements he made when he was arrested) and failing  
22 to obtain exculpatory evidence (fingerprints on the bicycle, a  
23 blood-alcohol test). Petitioner also contends that his defense  
24 counsel failed to move to strike his 1988 burglary conviction and  
25 suborned him to commit perjury by making him testify that he was  
26 intoxicated when he was arrested. Petitioner also alleges that the  
27 prosecutor committed misconduct by charging Petitioner's previous  
28 burglary conviction as a prior.

1 Petitioner's claims fail because his allegations do not amount  
2 to "clear and convincing evidence" that he is actually innocent of  
3 either his 1996 or 1988 convictions. Petitioner confuses the  
4 actual innocence standard with an inquiry into the merits of his  
5 case. He has provided no evidence akin to "credible declarations  
6 of guilt by another, trustworthy eyewitness accounts, or  
7 exculpatory scientific evidence" to support his innocence. Schlup,  
8 513 U.S. at 324. Instead, he alleges that misconduct at trial  
9 caused him to be prejudiced during legal proceedings. Such  
10 misconduct has no bearing upon whether he is actually innocent of  
11 the crimes of which he was convicted. Accordingly, his actual  
12 innocence claim fails.

13 CONCLUSION

14 The instant petition for habeas corpus was filed nearly nine  
15 years after the statute of limitations expired. Petitioner is not  
16 entitled to tolling or a delayed commencement of the limitations  
17 period, and his actual innocence claim is unsupported. Therefore,  
18 the petition is untimely because the statute of limitations expired  
19 on August 9, 1998. Accordingly, Respondent's motion to dismiss  
20 (docket no. 8) is hereby GRANTED.

21 The Clerk of the Court shall enter judgment in accordance with  
22 this Order, terminate all pending motions and close the file. The  
23 parties shall bear their own costs.

24 This Order terminates Docket no. 8.

25 IT IS SO ORDERED.

26 DATED: 8/28/08



27 CLAUDIA WILKEN  
28 United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

## DALE WILLS,

**Plaintiff,**

Case Number: CV07-03354 CW

V<sub>3</sub>

JAMES TILTON et al.

Defendant.

**CERTIFICATE OF SERVICE**

6 JAMES TILTON et al,  
7  
8 Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on August 28, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
located in the Clerk's office.

15           Bruce Louis Ortega  
16           California State Attorney's Office  
17           455 Golden Gate Avenue  
            Suite 11000  
            San Francisco, CA 94102-7004

18 Dale G. Wills J-16405  
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P.O. Box 5246  
19 Corcoran, CA 93212-5246

20 || Dated: August 28, 2008

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk